FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 28 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 381

E. E. ASHCRAFT AND JOHN WARE,
Petitioners,

vs.

STATE OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

JAMES F. BICKERS,
GROVER N. MCCORMICK,
Counsel for Petitioners.

INDEX

Subject Index.

	Page
Petition for writ of certiorari	1
A foreword	2
Statement of the case	10
Specification of errors	12
Argument	14
Exhibit "D"—Motion to dismiss filed in Supreme Court of Tennessee	43
Exhibit "E"—Answer to motion to dismiss filed in Supreme Court of Tennessee	48

Table of Cases Cited

Anderson v. *U. S.*, 87 L. Ed. 589	14
Ashcraft v. *Tennessee*, 322 U. S. 143, 64 S. Ct. 921, 88 L. Ed. 1192	1, 40
Brahm v. *U. S.*, 169 U. S. 532, 42 L. Ed. 568	14
Canty v. *Alabama*, 309 U. S. 628	14
Chambers v. *Florida*, 309 U. S. 227, 84 L. Ed. 419	14
Cross v. *Tennessee*, 140 Tenn. 510	14
Lomax v. *Texas*, 313 U. S. 544	14
McNabb v. *U. S.*, 87 L. Ed. 579	14
Malinski v. *New York*, 65 S. Ct. 781	14, 19
Polk v. *Tennessee*, 170 Tenn. 271	14
Rounds v. *Tennessee*, 171 Tenn. 512	14
Vernon v. *Alabama*, 313 U. S. 547	14
Ward v. *Texas*, 316 U. S. 547	41
White v. *Texas*, 310 U. S. 530	14
Wood v. *U. S.*, 128 F. (2d) 265	14, 17, 30
Ziang Sung Wan v. *U. S.*, 266 U. S. 1, 69 L. Ed. 131	14

Statutes Cited

Constitution of the United States, 14th Amendment	18
Private Acts of the Tennessee Legislature, 1917, Chapter 69	26

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 381

E. E. ASHCRAFT AND JOHN WARE,
Petitioners,

vs.

STATE OF TENNESSEE

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The case of these defendants has once been considered and passed upon by this Honorable Court, as was thought to a finality, *Ashcraft* v. *Tennessee,* 322 U. S. 143, 64 S. Ct. 921, 88 L. Ed. 1192. However this may be, they find that it is necessary in justice to themselves and to the end that their rights may be further, fully, and finally preserved to file in this Court this Petition for certiorari to the Supreme Court of the State of Tennessee.

Petitioner John Ware was indicted by the Grand Jury of Shelby County, Tennessee, and was charged with the mur-

der of one Zelma Ida Ashcraft in Shelby County, Tennessee. Petitioner E. E. Ashcraft was indicted by the same Grand Jury jointly with John Ware and was charged with the murder of Zelma Ida Ashcraft, his wife, and in a second count of said indictment was charged with being an Accessory before the Fact of the said murder.

They have been tried a third time by a Jury in Division One of the Criminal Court of Shelby County, Tennessee, convicted and sentenced to serve a life-term in the Tennessee State Penitentiary.

An appeal was perfected to the Supreme Court of Tennessee and on June 9, 1945 that Court affirmed the judgment of the lower court.

Your Petitioners are filing this Petition in this Honorable Court asking for a review of this case to the end that their rights may be by this Honorable Court further protected, and finally adjudicated. We are presenting to the Court with this Petition the complete authenticated record filed in the Supreme Court of Tennessee in this case.

A Foreword

For the information of the Court we desire to concisely set out just what transpired after this Honorable Court handed down its opinion in the *Ashcraft* case and before these defendants were forced to a third trial in the First Division of the Criminal Court of Shelby County, Tennessee.

The Court will remember that when this case was argued before it, the Representatives of the State of Tennessee, The Honorable Nat Tipton of the State's Attorney General's Office and the Honorable William Gerber, District Attorney General of Shelby County, Tennessee, admitted and conceded in open Court that, with the alleged admissions and confessions, so designated, secured from these

defendants in the "confession" chamber on the fifth floor of the Shelby County Jail out of the record and declared illegal, there was left no evidence upon which a conviction could rest or which would in any way connect these defendants with the commission of this crime.

This Court declared illegal Ashcraft's confession because his Constitutional Rights were invaded in securing it and reversed his case.

This Court in the light of the circumstances and the admissions and concessions on the part of the legal representatives of the State of Tennessee vacated the judgment of the State Court as to Ware and sent it back for further consideration and disposition.

Thereupon there was filed in the Supreme Court of Tennessee in behalf of Ashcraft and Ware a motion to dismiss the case and restore to these defendants their liberties. The Supreme Court was particularly asked to pass upon the legality of Ware's alleged admissions and confessions and declare them invalid in the light of the opinion and mandate of this Honorable Court as to Ashcraft.

A copy of this motion is attached to this Petition marked Exhibit "D".

In answer to defendants written motion in the Supreme Court of Tennessee there was filed an answer by the Honorable William Gerber, Attorney General of Shelby County, Tennessee. A copy of which is attached hereto and marked Exhibit "E".

In this answer we find the following Statement:

> "The respondent most emphatically denies that a conviction cannot be sustained against the defendant Ashcraft without his confession, which was made shortly after the commission of this atrocious crime."

The position of the State of Tennessee taken in its answer in the Supreme Court of Tennessee after this Honorable

Court had handed down its opinion was diametrically opposed to the position taken in this Court.

In the answer the District Attorney General was careful not to say that he had any newly discovered evidence or any additional available evidence against these defendants. All that he said was that he could convict them. Upon further consideration of the case the Supreme Court of Tennessee overruled the motion of these defendants stating among other things that to grant it would be exercising original jurisdiction. It reversed the case as to both defendants and remanded it to the First Division of the Criminal Court of Shelby County, Tennessee not for a new trial but

> "for such further proceedings as will not be inconsistent with the judgment and mandate of the Supreme Court of the United States".

The Supreme Court of Tennessee would not or did not specifically rule upon the legality or the admissibility of Ware's confession even though it was urged to do so in Ware's motion and even though this Honorable Court in its opinion "remanded his case to that Court for further proceedings", for its ruling on that very question.

The legality of Ware's confession was the only question in issue. There existed no other ground for reversal.

The Supreme Court of Tennessee said in this regard, and it is all that it did say, on this point as follows:

> "Both the defendants Asheraft and Ware were convicted of murder in the First Degree upon the person of Mrs. Asheraft, wife of the defendant Asheraft. There were certain alleged confessions admitted on the trial of this case. Following the convictions of both defendants, there was an appeal to this Court, and the convictions as to both of the defendants were affirmed, the Court holding that the alleged confessions were properly admitted. A subsequent review of the convictions by the Supreme Court of the United States

resulted in a reversal of the judgment of this Court, that Court holding that the alleged confessions were illegally obtained and were not therefore admissible in evidence."

It is obvious from the above quotation that the Supreme Court of Tennessee interpreted the opinion of this Honorable Court to hold in effect that to Ware's confession was illegal as well as Asheraft's.

At least, that is what the Supreme Court of Tennessee said on the subject and it is all that it said. With this comment, it simply reversed the case as to Ware.

Thereupon, there was filed in behalf of the defendants in the Criminal Court of Shelby County, Tennessee three motions in which they asked the Court to examine the record considered by this Honorable Court and, by proper precedure, upon the opinion of this Honorable Court, the memorandum opinion and procedendo of the Supreme Court of Tennessee, the admissions, concessions, representations, and requests of the Attorneys representing the State of Tennessee in this Court in oral argument, and in briefs filed, have entered a verdict of Not Guilty in their behalf.

These motions are found in the first pages of the record in this case filed herewith.

The Trial Court upon a hearing refused to examine the printed record considered by this Court or to give import to or accept the admissions and concessions of the Attorneys representing the State of Tennessee in this Honorable Court "That the convictions could not be sustained without the confessions".

He refused to examine the record to ascertain whether, as a matter of law, there was any evidence in the record with the confessions of Asheraft and/or Ware elided to sustain a conviction or to longer keep these defendants incarcerated.

He refused to examine the record to ascertain whether or not in the light of the opinion of this Honorable Court and the memorandum opinion of the Supreme Court of Tennessee Ware's confession was legal. He refused to read the record considered by this Honorable Court, didn't know what was in it, refused to rule on the status of these defendants even though the Supreme Court of Tennessee had referred the case to him not for a new trial but

> "for such further proceedings as will not be inconsistent with the judgment and mandate of the Supreme Court of the United States".

The Court overruled these motions and forthwith and arbitrarily put these defendants to a Third Trial.

Exception to the action of the Court was seasonably entered, it being the position of Ashcraft that the State of Tennessee through its legal representative had conceded that with his confession out of the record there was no evidence upon which to further hold him and that there was, as a fact, no evidence in the record upon which to further hold him and that to arbitrarily put him to a Third Trial would constitute "unfair practice", persecution, a further violation of his constitutional rights, due process, and would be inconsistent with the opinion, judgment, and mandate of this Honorable Court and an affront to orderly and proper administration of criminal justice.

It was the position of Ware in his exception that it was the interpretation of the Supreme Court of Tennessee of the opinion of this Honorable Court that his confession was illegal and that he could not be convicted upon it, and that there was no evidence in the record that even presented a suspicion against him, and that, in any event, the Supreme Court of the State of Tennessee remanded his case to the Judge of the Criminal Court of Shelby County, Tennessee, not for a new trial, but for the Court to examine the record

and in the light of the opinion of this Honorable Court, and the admissions and concessions of the legal representatives of the State of Tennessee, rule upon the legality of his alleged confession as a matter of law, and for proceedings not inconsistent with the opinion of this Honorable Court.

It was his further position that he was entitled to have his case, or this legal question involved in it, determined by some Court in Tennessee on the record as made and considered by this Honorable Court and that to put him to trial a third time under these circumstances without such a ruling would constitute "unfair practice", persecution, a further violation of his constitutional rights, due process, and would be inconsistent with the opinion, judgment, and mandate of this Honorable Court and an affront to orderly and proper administration of criminal justice.

If the Court had considered the motion of these defendants, examined the record and opinion of this Honorable Court he would have been forced as a matter of law to liberate them. They were entitled to this consideration by the Court. If the Supreme Court of Tennessee was not going to act on their case in the light of the opinion and mandate of this Honorable Court the trial court should have done so under instructions from the Supreme Court of Tennessee in its mandate.

The action of the Trial Court in overruling the motion of these defendants was assigned as error in the Supreme Court of Tennessee in this case.

Your petitioners would show to the Court that they filed a motion in the criminal court of Shelby County, Tennessee for the presiding Judge R. G. Kinkle to recuse himself upon the grounds that at the time of the murder of Mrs. Ashcraft and the investigation of the crime was being proceeded with, he was then a member of the staff of the Prosecuting Attorney General William Gerber and that the

entire force was being used on Ashcraft and Ware to secure confessions. This motion by Judge Kinkle was granted and he recused himself. Under the statutes of the State of Tennessee the recused Judge selects a Judge to preside for him. Judge Kinkle selected a recently appointed Circuit Judge, the Honorable John Wilson, to preside in this case and he heard the aforementioned motions.

Thereupon, a motion was made to have Judge Wilson recuse himself. After the first trial of these defendants had been had and before a Bill of Exceptions could be signed by the then presiding Judge Philip Wallace, the said Judge Wallace died. The Honorable John Wilson then a practicing Attorney at the Memphis Bar was by the Lawyers elected to preside over the First Division of the Criminal Court of Shelby County, Tennessee. The Bill of Exceptions of the First Trial was then presented to Judge Wilson for examination, authentification, and certification to the Supreme Court of Tennessee on appeal. He knew nothing of the case, of its proceedings, but upon examination of the record and Bill of Exceptions he certified it to the Supreme Court as being a true and correct copy of all the proceedings had in the case and authenticated all the exhibits, among them being the two alleged confessions of these defendants, E. E. Ashcraft and John Ware. In the light of these facts this motion for him to recuse himself was made. This was overruled and the defendants ordered to trial forthwith.

Upon the hearing of the preliminary motions above discussed, it became apparent to respective Counsel representing these defendants that an effort would be made by representatives of the State to again introduce in evidence for the consideration of a Jury the so-called confession of John Ware. It was also perfectly apparent that, if this was done, it would be an utter impossibility for defendant Ashcraft

to secure a fair and impartial trial. Ware's alleged confession is of such a highly prejudicial character against Asheraft that its use in a joint trial of them would be not only prejudicial but fatal to a fair and impartial trial of him. Efforts on the part of the Trial Court in this situation, try as he might, could possibly allay this fatal prejudice.

Thereupon, there was seasonably filed in behalf of the defendant Asheraft a Motion for Severance.

This Motion is found in the first few pages of the record.

The Court promptly overruled this Motion, to which action an exception was entered.

This action of the Court was assigned as error in the Supreme Court of Tennessee on appeal.

MAY IT PLEASE THE COURT:

We have set forth for the benefit of this Honorable Court just what transpired in this case involving these defendants from the time of the handing down of the opinion of this Court to the going-into the actual trial of this case for a Third Time.

It is submitted that everything that has transpired since the overruling of the motions of these defendants has been in disregard of, and inconsistent with the holding and opinion of this Honorable Court, and in violation and in disregard of the Constitutional Rights of these defendants. After all, these defendants are human beings, human rights are at stake and these rights have been shunted from Court to Court in Tennessee while they personally suffered incarceration in the Penitentiary of the State.

The Tennessee Courts should have put an end to this litigation and not forced these defendants to an ordeal of a Third Trial on the same evidence from the same wit-

nesses, and none other, that appeared in the record considered by this Honorable Court.

The opinion and mandate of this Honorable Court in this case was, we think, plain and positive.

It should have been gracefully and in a sportsmanlike manner accepted. No efforts should have been put forth to evade, circumscribe, or circumvent either its letter or spirit by either the Legal Representatives of the State of Tennessee or any other Agency. Both the Constitution of the United States and the orderly and proper Administration of criminal justice forbid it.

Statement of the Case

The same facts are found in the record here as were embodied in the record heretofore considered by this Court. The same witnesses testified to the same facts. There are no new facts in this record. The same controlling errors will be assigned hereafter as were found in our former petition for Certiorari.

These defendants stand convicted here in this record on the same testimony that appeared in the record before considered by this Court, secured from them on the fifth floor of the Shelby County Jail, the "confession chamber" as it was designated by this Court, through coercion, intimidation, long quizzing and threats of mob violence and mental and physical torture. They stand convicted out of their own mouths.

The case of Ware is precisely the same case. There is not one iota of difference.

The same witnesses that testified before for the State of Tennessee were allowed, over the objection and exception of the defendant Ashcraft, to testify before the Jury to everything that went on and transpired between him and the representatives of the Attorney General's Office in the

"confession chamber" for approximately thirty-six hours. The only evidence left out of this record that appeared in the other record is the typewritten instrument alleged to be the typewritten unsigned confession of Ashcraft, and the alleged admission of Ashcraft that Ware's confession was true, made by him when it was presented to him on Monday morning, June 16th, at the end of this thirty-six hour ordeal of coercion and inquisition in the presence of Banker Castles and Business-man Pidgeon brought in for the ceremony and celebration.

The trial court took the view that this Honorable Court ruled inadmissible only the typewritten instrument alleged to be the confession of Ashcraft and allowed Homicide Officer Becker, other Officers and Representatives of the Attorney General's Office to rehash and testify again to all of the oral conversations, quizzings, and incriminations had with Ashcraft in the "confession chamber" for a period of thirty hours or more. This Court had held illegal as evidence everything that transpired between Ashcraft and all of these various officers in this room of inquisition. Yet, the trial court erroneously permitted it to go to the Jury for its consideration and the Supreme Court of the State of Tennessee has affirmed.

Ashcraft stands convicted upon it and the prejudicial confession of Ware, so-called, in spite of the bar to it of the Constitution of the United States, and Due Process, and in the face of the plain and unambiguous opinion of this Honorable Court.

As aforesaid, the same witnesses testified in this case to the same facts as testified in the record considered by this Honorable Court before. There are presented no new facts by any new witnesses.

Here they are:

This Record	*The Other Record*
George A. Becker	George A. Becker
Robert Ezell	Robert Ezell
Henry Waldauer	Henry Waldauer
Dr. J. A. McQuiston	Dr. J. A. McQuiston
W. Preston Battle	W. Preston Battle
H. L. Jayroe	H. L. Jayroe.

Again we submit that these defendants stand convicted, solely and alone, on illegal evidence secured from them by Prosecuting Officers of Shelby County, Tennessee, by illegal means, coercion, intimidations, and inquisitions without the aid of counsel or friends, on the 5th floor of the Shelby County Jail, a "confession chamber", in violation of their Constitutional Rights. They were forced to convict themselves in a Star Chamber forbidden by the Constitution of the United States.

It is submitted that there are raised here in behalf of these defendants substantial Federal questions borne out by the record, and that this Honorable Court has already so found on the same evidence in a former, similar record.

Specification of Errors

1. THE TRIAL COURT AND THE SUPREME COURT OF TENNESSEE ERRED IN NOT SUSTAINING THE MOTIONS FILED IN THEIR BEHALF, FOR THE REASONS STATED THEREIN, TO DISMISS THEIR CASES AND TO RESTORE THEIR LIBERTIES TO THEM, THIS BEING THE ONLY LEGAL PROCEDURE CONSISTENT WITH THE OPINION OF THIS HONORABLE SUPREME COURT OF THE UNITED STATES.

DEFENDANT ASHCRAFT SAYS THAT, AS TO HIM, NO OTHER POSSIBLE LEGAL ACTION COULD BE TAKEN OTHER THAN TO DISMISS HIM.

DEFENDANT WARE SAYS THAT THE SAME ACTION SHOULD HAVE BEEN TAKEN BY THE COURT AS TO HIM ON THE MERITS OF HIS CASE AND UPON THE RECOMMENDATIONS OF THE ATTORNEY GENERAL OF THE STATE OF TENNESSEE.

2. DEFENDANT ASHCRAFT SAYS THAT THE TRIAL COURT ERRED IN NOT GRANTING HIS MOTION FOR A SEVERANCE FOR THE REASONS STATED, AND THAT THE SUPREME COURT OF THE STATE OF TENNESSEE ERRED IN SUSTAINING THE ACTION OF THE LOWER COURT.

HE SAYS THAT IT WAS, AND IS, GLARINGLY APPARENT THAT HE COULD NOT GET, AND DID NOT GET, A FAIR AND IMPARTIAL TRIAL JOINTLY WITH HIS CO-DEFENDANT WARE WITH THE USE OF WARE'S ALLEGED CONFESSION AS EVIDENCE AT THE HEARING.

THIS WAS ERROR BECAUSE HIS CONSTITUTIONAL RIGHTS COULD NOT BE PROTECTED AND PRESERVED AND THE ACTION OF COURT WAS VIOLATIVE OF "FAIR PRACTICE", DUE PROCESS, AND ORDERLY ADMINISTRATION OF CRIMINAL JUSTICE.

3. DEFENDANT ASHCRAFT STANDS CONVICTED AT THE HANDS OF THE STATE OF TENNESSEE ON ILLEGAL EVIDENCE SECURED FROM HIM ILLEGALLY BY THE PROSECUTING OFFICERS OF SHELBY COUNTY, TENNESSEE. THE SUPREME COURT OF TENNESSEE ERRED IN SUSTAINING HIS CONVICTION ON THIS EVIDENCE GIVEN BY HOMICIDE OFFICER BECKER AND OTHER STATE WITNESSES IN THE NATURE OF CONVERSATIONS, ADMISSIONS, QUIZZINGS, INCRIMINATIONS, FACTS AND CIRCUMSTANCES RELATIVE TO THE KILLING OF HIS WIFE, TRANSPIRING AND TAKEN FROM HIM BY COERCION, DURESS, AND LONG QUIZZINGS WITHIN THE "CONFESSION CHAMBER" ON THE FIFTH FLOOR OF THE SHELBY COUNTY JAIL OVER A PERIOD OF APPROXIMATELY THIRTY-SIX HOURS.

THIS WAS ERROR BECAUSE SAID EVIDENCE WAS ILLEGAL TO BE USED AGAINST HIM FOR ANY PURPOSE AND SECURED IN A MANNER VIOLATIVE OF HIS CONSTITUTIONAL RIGHTS AND PARTICULARLY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

IT WAS ERROR, FOR THE FURTHER REASON, THAT THIS HONORABLE SUPREME COURT OF THE UNITED STATES HAD IN ITS OPINION HELD SAID EVIDENCE TO BE ILLEGAL, COERCIVE, INVOLUNTARY AND INADMISSIBLE AGAINST HIM FOR ANY PURPOSE.

DEFENDANTS IN THIS CASE, BOTH OF THEM, STAND CONVICTED UPON ILLEGAL AND INADMISSIBLE EVIDENCE IN THE NATURE OF ALLEGED CONFESSIONS, ADMISSIONS, AND INCRIMINATING STATEMENTS TAKEN FROM THEM BY THE PROSECUTING OFFICERS OF SHELBY COUNTY, TENNESSEE, IN THE "CONFESSION CHAMBER" ON THE FIFTH FLOOR OF THE SHELBY COUNTY, TENNESSEE JAIL THROUGH COERCION, INTIMIDATION, ABUSE, THREATS OF MOB VIOLENCE, AND IN VIOLATION OF THEIR CONSTITUTIONAL RIGHTS AND PARTICULARLY THE DUE

PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

THE SAID EVIDENCE WAS IN NO SENSE FREE AND VOLUNTARY AND IT WAS ERROR FOR THE COURT TO SUSTAIN AND CONVICT UPON SAID ILLEGAL TESTIMONY.

IT WAS FURTHER ERROR, FOR THE REASON THAT, THIS HONORABLE SUPREME COURT OF THE UNITED STATES HAD DECLARED SAID EVIDENCE ILLEGAL AND HAD STATED THAT THE CONSTITUTION OF THE UNITED STATES WAS A BAR TO A CONVICTION UPON SUCH EVIDENCE.

Supporting Authorities:

Polk v. *State of Tennessee*, 170 Tenn. 271;
Cross v. *State of Tennessee*, 140 Tenn. 510;
Code State of Tennessee (1932), Sections 11,547, 11,548, 11,549, 11,554 and 11,555;
Brahm v. *United States*, 42 L. Ed. 568, 169 U. S. 532;
Ziang Sung Wan v. *United States*, 266 U. S. 1, 69 L. Ed. 131;
Chambers v. *Florida*, 309 U. S. 227, 84 L. Ed. 419;
White v. *State of Texas*, 310 U. S. 530;
Lomax v. *State of Texas*, 313 U. S. 544;
Vernon v. *State of Alabama*, 313 U. S. 547;
Canty v. *Alabama*, 309 U. S. 628;
McNabb et al. v. *United States*, 87 U. S. L. Ed. 579;
Anderson v. *United States*, 87 U. S. L. Ed. 589;
Malinski v. *People of State of New York*, 65 S. Ct. 781;
Rounds v. *The State*, 171 Tenn. 512;
Wood v. *United States*, 128 F. (2d) 265, 271.

Argument

MAY IT PLEASE THE COURT:

May it be borne in mind by the Court throughout that there is no new evidence in this record presented by any new witnesses that did not appear in the printed record heretofore considered by this Honorable Court. It is all the same. There is absent from this record that appeared in the other

record only what is purported to be a typewritten statement by Asheraft, unsigned and an oral statement alleged to have been made by Asheraft, that Ware's alleged confession was true, made on the early morning of Monday, June 16th, before Banker Castles and Business-man Pidgeon and the Officers when it was presented to him.

The case of Ware is identical with the case presented in the other record. He stands convicted upon his alleged confession and its use, illegally, obviously aided in the conviction of Asheraft.

Both defendants stand convicted on testimony presented as having come from the mouth of these defendants, secured from them in the "confession chamber" on the fifth floor of the Shelby County Jail.

There can be no denial of this statement. This Honorable Court is familiar with all of the details of this case as to both of these defendants.

As to Asheraft, we most respectfully submit that this Honorable Court has already passed upon and decided the issue here. We quote the following from the opinion of this Court:

> "In reaching our conclusion as to the validity of Asheraft's confession we do not resolve any of the disputed questions of fact relating to the details of what transpired within the confession chamber of the jail or whether Asheraft actually did confess. Such disputes, we may say, are an inescapable consequence of secret inquisitorial practices. And always evidence concerning the inner details of secret inquisitions is weighted against an accused, particularly where, as here, he is charged with a brutal crime, or where, as in many other cases, his supposed offense bears relation to an unpopular economic, political, on religious cause.
>
> "Our conclusion is that if Asheraft made a confession it was not voluntary but compelled. We reach this conclusion from facts which are not in dispute at all.

Ashcraft, a citizen of excellent reputation, was taken into custody by police officers. Ten days' examination of the Ashcrafts' maid, and of several others, in jail where they were held, had revealed nothing whatever against Ashcraft. Inquiries among his neighbors and business associated likewise had failed to unearth one single tangible clue pointing to his guilt. For thirty-six hours after Ashcraft's seizure during which period he was held incommunicado, without sleep or rest, relays of officers, experienced investigators, and highly trained lawyers questioned him without respite."

NOW, MAY IT PLEASE THE COURT:

What the Prosecution did in this case, as to Ashcraft, with the permission of the Court, over the objection and exception of the Defendant, was to allow Chief Homicide Officer Becker, other officers, and representatives of the Attorney General's Office to testify to all "the details of what transpired within the 'confession chamber' of the jail" up to the time Ashcraft is alleged to have given his confession on Monday morning, June 16th, at the culmination of his ordeal.

This testimony covers approximately 100 pages of this record.

The typewritten instrument purporting to be Ashcraft's confession or statement, left out of this record but appearing in the other, embodied both the substance and the details of what transpired in the "confession chamber" over the thirty-six hour period of Inquisition. These details consisting of oral statements, conversations, incriminations, etc. were testified to and related in both of these records.

We submit that this Honorable Court in its opinion in this case ruled that all of this evidence was held illegal for use against Ashcraft and that the Constitution of the United States barred a conviction upon it.

This Honorable Court obviously had in mind this very proposition in preparation of its opinion, for the reason that it cited in one of the foot notes of the opinion the case of *Wood* v. *U. S.*, 128 F. 2nd 265.

The opinion in this case was written by Mr. Justice Rutledge. Here it is held that the Constitution protects the right, the privilege of an accused person and its protecting power should be liberally construed. Constitutional rights, the privilege has roots deeper than any single Rule of Evidence.

We have here, in this case of Asheraft's, "unfair practice", coercion, duress, intimidation, basic violation of fundamental constitutional right and privilege. These invalidate and nullify this conviction independently of any so designated Rule of Evidence.

Asheraft is the victim of a prosecutor's inquisition in search of evidence for conviction—evidence from his own lips. This inquisition and search of evidence had both its conception and birth in a preconceived and immutable determination to convict.

We say that to sustain this conviction on this evidence forced from Asheraft by coercion, duress, intimidation and applied psychology would reduce the security and protection of constitutional due process to a mere shadow.

The Court will see from the record that the prosecuting attorney all through the trial of the case referred to this evidence as "circumstantial evidence" or "just what happened up there" meaning in the "confession chamber" and the details of the inquisition as was being testified to by Becker and all of the other witnesses. He urged upon the Court that it was competent as "circumstantial evidence" against Asheraft and "just what happened up there" was competent for the same reason.

In answer, we say that it is elementary that coerced "circumstantial evidence" is just as repulsive and inadmissible as coerced, direct evidence. It is the coercion and duress used in the securing of the so-called evidence that violates the constitutional rights of the accused and nullifies and prohibits its use to convict.

We submit that this Court has already found in its opinion, in this very case, coercion, intimidation, and violation of Ashcraft's Constitutional Rights.

We submit that no evidence that came out of this "confession chamber" of any kind or character can constitutionally be used against Ashcraft to convict him. This has been done. He stands convicted upon evidence, whatever we may call it, from his own lips, that came out of this "confession chamber". Of this there can be no denial. No other evidence is in the record against him.

It was introduced and used at the trial to convict him—used for that purpose and secured, as found by this Honorable Court, in violation of his constitutional rights and the constitution "bars" the conviction.

We may spray this evidence with all the perfumes of Araby and it still has the aroma and the stench of the Star Chamber, the room of inquisition, the "confession chamber" on the fifth floor of the Shelby County Jail.

This evidence, with this offensive aroma, was moved right out of the "confession chamber" down into the Court room and allowed to be paraded before the jury against this defendant Ashcraft.

This conviction, we submit, is a nullity and in violation of the opinion and mandate of this Honorable Court as well as the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

This whole case consists simply of the moving of all the transpirings and the details of what took place in the "con-

fession chamber'' on the fifth floor of the Shelby County Jail during the thirty-six hour inquisition down into the Court Room of the First Division of the Criminal Court of Shelby County, Tennessee, and the presenting of these transpirings and details before a jury which convicted this defendant Ashcraft and defendant Ware as well.

The Constitution of the United States stands as a bar to such a conviction and the orderly administration of criminal justice condemns it.

When we began to give thought to the preparation of our brief to be filed in the Supreme Court of Tennessee in this case, we had not decided just how we would designate this evidence upon which Ashcraft stands convicted. It just so happened that the Advance Reporter of the Opinions' of this Honorable Court came to our desk. We found that Mr. Justice Douglass in his opinion in the case of *Malinski* v. *People of State of New York*, 65 S. Ct. page 781,

gave us the answer, he said

> "Constitutional Rights may suffer as much from subtle intrusions as from direct disregard".

After the opinion of this Honorable Court in this case came down, holding that the State of Tennessee had utterly disregarded the constitutional rights of this defendant Ashcraft, the Representatives of the State of Tennessee took another studied, deliberate, and subtle approach to this case, obsessed with an immutable and more or less fanatical determination to convict—constitutional rights or no constitutional rights, the opinion of this Honorable Court or no.

The subtlety of the legal representatives of the State of Tennessee showed up first when their position was changed. They took the solemn position in this Court that with Ash-

craft's admissions, statements, and purported confession elided from the record that there was no evidence upon which to convict. After the opinion of this Honorable Court came down, they took the position in the Supreme Court of Tennessee and in the trial court that there was evidence in the record upon which they COULD convict.

This constituted a subtle legal somersault.

The subtlety of these representatives showed up a second time when the attempt was made, and successfully, to introduce this evidence or testimony under consideration, consisting of the details of "What happened up there" in the "confession chamber" between the officers and Ashcraft in the "confession chamber" leaving out the written instrument which embodied these details or their substance.

We say that this constituted subtle intrusion upon the constitutional rights of this defendant Ashcraft, forbidden by the holding of this Honorable Court both in the *Ashcraft* and *Malinski* cases.

It constituted an effort to bring in evidence against him through the back door of the Court House when the front door to its entrance had been closed.

The Constitution and the Opinions of this Honorable Court closed both doors.

The subtle intrusion appeared again when the argument of this case to the jury was about to begin. Throughout the trial all reference to the fact that this case had been before this Honorable Court for consideration had been successfully kept from the jury.

Before argument began Attorney General Gerber made a motion that counsel for these defendants be not allowed to discuss the opinion of this Honorable Court to the jury. He did not want the jury to be told of the concession made by the representatives of the State of Tennessee in this

Court—that there could be no conviction without the admissions and confessions of these defendants.

In this regard the Attorney General said:

> "We say that what Nat Tipton said to Hugo Black or what Hugo Black said to Nat Tipton cannot be related to this Jury by the reading of that opinion".

This motion by the Attorney General was sustained by the Court and exception noted.

The attorneys for these defendants were not permitted to argue fully the law and the facts of this case to the jury.

They had a constitutional right to have their Counsel argue fully both the law and the facts of their case. The Opinion of this Honorable Court was part of this case.

It is submitted that defendant Asheraft in this case should have been granted a severance.

This whole case, we respectfully submit, has in its various mazes and ramifications degenerated into a violation of Due Process and it is from this standpoint and in this light that we assign error in not granting Mr. Asheraft severance.

Mr. Justice Douglass in his opinion in the *Malinski* case had the following to say:

> "We have not mentioned Rudish. He did not confess to the Police. He was tried jointly with Malinski, his counsel electing not to ask for a severance."

The clear implication here is that if Counsel had asked for a severance for Rudish it should have been granted. Here in this case, Asheraft's statements and confession had been declared illegal and that it could not be used against him. It was the contention of the State that Ware had made a confession and it was perfectly apparent when the Motion for Severance was made that the Court was going to allow Ware's confession to go to the jury as valid and admissible.

Certainly the effort by the State was going to be made to introduce it.

In this situation the severance should have been allowed. Its use when the defendants were tried jointly was fatal to a fair and impartial trial for Ashcraft.

The Opinions in the *Malinski* case discuss this question at length.

We submit that all of the assignments of error above set out should be by this Court sustained as to Ashcraft and his liberties restored to him by proper mandate.

We shall now, MAY IT PLEASE THE COURT, discuss briefly the case of defendant John Ware.

This Court is thoroughly familiar with the facts of his case, having considered it upon the other record. Precisely the same facts appear in the record.

John Ware at the time of the commission of the crime was a 19 year old negro boy. He was a poor, ignorant, young common laborer. Those of us who know and have lived among this type of young negro boy know that he has and lives in mortal fear of what he calls "the law". A policeman or a deputy sheriff to the young negro boy is known and designated in his lingo as "the law". If there are two policemen he calls them "two laws". If there are more, he designates them as "3, 4, 5, or 6 laws". He doesn't fear the Judge sitting on the bench of the Criminal Court or the Criminal Court Room where the proceedings are held in daylight. It is "the laws" that gives him the shakes. In order to fairly consider this case of John Ware, it must be approached with this picture in the mind's eye.

Now, what do we have here?

Around midnight while he, a young girl, and a young relative of his were sound asleep in one bed in a little sparsely furnished room there suddenly burst in upon him "six or more laws" with flashlights and pistols. He

was told to get up and dress. He says that he was knocked in the head, manhandled, and virtually lifted into the automobile to be taken—he knew not where.

The officers knew when they went out to look for him that they were looking for him as the murderer of Mrs. Ashcraft. They didn't treat him with kid gloves even though they denied striking him.

No argument is necessary for us to draw a just and irrevocable conclusion that from that moment John Ware's will was not his own. In this situation his will was "the law's", officer's, will. It is admitted in the record that he was not told why he was being dragged out of bed, where he was going, or what the officers were going to do with him. No doubt he was stiff with fear.

When he was brought to the jail the combined power and force of both the Sheriff's Office and the Attorney General's Office were applied to Ware. It is admitted in the record that Ashcraft was left completely alone. The Officers and the Attorney General's Office started out for a confession and got it, to their satisfaction.

Hours of pressure were put on him. Ware says that he was threatened with mob violence. He says he was put in a cell of solitary confinement, a dungeon. This cell is in a secret place in the jail and if Ware had not been put in this cell he never would have known of its existence. He testified to this fact on his first trial.

At about 2:00 o'clock in the morning Attorney General Gerber called Court Reporter Waldauer from his bed and told him to come down to the County Jail at once that Ashcraft was about to make a confession and he wanted him to take it down in shorthand.

We know, at that time, that Ware had not made any statements or admissions satisfactory to the Attorney General's Office because he didn't tell Waldauer he wanted him to

take the statement of Ware, even though they had been working on Ware with furious force and power since he arrived at the jail. Ashcraft was left alone all of this time. In fact, according to the record, they never talked to Ashcraft any more until they had secured a satisfactory written statement from Ware.

Ware says that he told the Officers that if they would not hurt him and would not turn him over to the mob, he would say anything that they wanted him to say.

He denies that he had anything to do with the killing and denies that any statements he made were free and voluntary but they were coerced and the product of mortal fear for his life.

It is our insistence that Ware's statement or confession is in any sense free and voluntary and that his constitutional rights were violated and he was forced to give evidence against himself, that the evidence produced against him is illegal and invokes Due Process in his behalf, that he was held incommunicado, persistently and continuously quizzed without the aid of Counsel or friends.

It is submitted that Ware's case should be by this Court reversed and disposed of finally for the following reasons:

First

The motions made in his behalf in the Supreme Court of the State of Tennessee and in the Criminal Court of Shelby County, Tennessee should have been sustained in accordance with the opinion of this Honorable Court and the recommendations and concessions of the Attorneys representing the State of Tennessee.

Second

Because he stands convicted upon illegal evidence in the nature of purported admissions, confessions, and incrimina-

tions, secured from him, involuntarily and illegally and in violation of his constitutional rights and particularly Due Process.

They were secured from him by force, coercion, intimidation, threats of mob violence and by third degree methods.

Third

He was held incommunicado without the aid or advice of friends and was deliberately denied the right of Counsel in violation of his constitutional rights. These are admitted facts in this record.

He is convicted upon evidence purported to come from his own mouth secured from him illegally and presented against him by Officers securing it, and the Constitution of the United States forbids conviction upon it.

The first two of these grounds or reasons presented for reversal have already been discussed in this petition and were fully covered in the former petition filed in this case.

The last ground for reversal, wherein the charge is made that both Ware and Ashcraft were deprived of their Constitutional Right to Counsel, we desire to discuss briefly in the light of this record.

This Court has held in numerous cases, which we deem for the sake of brevity unnecessary to cite, that an accused person is entitled to the aid and advice of Counsel at all times. This is a Constitutional Right.

We solemnly assert, as Counsel for these defendants and as Members of the Bar of this Court, that the Constitutional Rights of these defendants were deliberately, studiously, and purposely violated by the Attorney General of Shelby County, Tennessee, and his Aides and Assistants, and by the Officers of the Sheriff's Office of said County. This record conclusively shows that they were deliberately and consciously deprived of their right to Counsel.

This phase of this case was not developed in the record considered by this Honorable Court before.

We have in Shelby County a Public Defender who is a Public Officer. This office was created by an Act of the Legislature of the State of Tennessee, Chapter 69 of the Private Acts of said Legislature for the year 1917. This office was created for the purpose of defending and protecting, at all times, the Constitutional Rights of poor and indigent persons who may be charged with crime. The duties of this Officer, among other things, are as follows, quoting from the Act:

> "To represent generally, all persons who are without means to employ counsel, who have been indicted by the Grand Jury or charged with the commission of any crime and he shall give counsel and advice to such persons in and about any charge against them."

The Act further states:

> "He shall take and file the Constitutional Oath of Office."

This Office at the time of the commission of this crime was held by an able lawyer in Memphis. He had his office at one end of the corridor of the Criminal Court's Building and the Attorney General of Shelby County had his office at the other end of the corridor.

The Attorney General's Office deals with this Officer every day of the business year. We will say that most of his dealings with him are in the daylight hours in the Open Court Room of the Criminal Court and not upstairs on the fifth floor of the Shelby County Jail in the Inquisition or "confession chamber."

However, this may be, both the Attorney General and all these Officers knew that the Public Defender was subject to call and they knew that it was his legal duty, under

the Statute creating his office, to give counsel, aid and advice to these indigent defendants.

They knew this when they took Asheraft in custody at 7:00 o'clock, on Saturday night, June 14th.

They knew this when they took Ware into custody shortly after 12:00 o'clock on the early morning of June 16th.

They could have called the Public Defender when they called Court Reporter Waldauer to take down statements in shorthand.

From 7:00 o'clock Saturday night, June 14th, throughout this ordeal, according to the record, the Attorney General and the Sheriff's Office was a beehive of activity. They were after confessions from Asheraft and later Ware. The Public Defender was at home over the weekend oblivious of all of these activities.

The Legislature of the State of Tennessee passed this Act and created this office as a bulwark against the mistreatment of and the invasion and violation of the Constitutional Rights of citizens charged with the commission of crime in Shelby County, Tennessee.

Now, neither the Attorney General's Office nor Officers of the Sheriff called in the Public Defender. They deliberately and studiously refused to do this. They wanted these confessions and they knew that they were violating the Constitutional Right of these defendants in the pursuance of their efforts. The Public Defender would have advised them of all of their rights against self-incrimination and all of their rights in this regard. This would have been an interference of the processes of the Attorney General and the Sheriff's Office and they would have none of it,—and did not.

On this subject Mr. Becker, Chief Homicide Officer, testified as follows:

"Q. John Ware had no friends in the room?
A. Didn't have anybody he knew.
Q. He didn't have a lawyer?
A. No, sir; he did not.
Q. He didn't call for a lawyer,—you didn't call for a lawyer for him, did you?
A. No, sir.
Q. There is a Public Defender in Shelby County?
A. Yes, sir.
Q. He is paid lawyer, paid to advise—paid by Shelby County,—to advise and to take care of indigent people, and his services were at your call, were they not?
A. I imagine so, yes.
Q. Why didn't you call him?
A. I didn't see any reason to call. There is no law stating I had to call a lawyer for him or friends.
Q. That is your construction of the law.

Gen. Gerber: I want to make an objection to the argument going on between Mr. McCormick and the witness as to what the law is. Your Honor knows what the law is; I object to that.
Mr. McCormick: He made the statement there was no law.

A. I said I new of no law that required me to call a lawyer, that is right.
Q. How long have you been a Deputy?
A. About 15 years possibly.
Q. You were the head of the Homicide Bureau Office of Shelby County?
A. Yes, sir; that is right.
Q. How long have you had that office?
A. Probably 6 years." (Record Pages 86-87.)

Mr. Becker further testified before the Jury as follows:

"Q. Now of course none of his friends or his people were there?

A. No, sir, they were not.

"Q. And he didn't have a lawyer there?

A. He did not.

Q. Mr. Battle was there representing the State?

A. Mr. Battle was on the investigation.

Q. He is a pretty able Lawyer?

A. Yes, sir.

Q. He represented the State?

A. Yes, sir.

Q. Why didn't you call John Ware a lawyer?

A. I wasn't under any obligation to call him a lawyer. He didn't ask for one and at that time I didn't even know that he needed a lawyer.

Q. When you found out that he did need a lawyer, why didn't you call him one?

A. Because I wasn't under any obligation to call one. He didn't ask for one.

Q. You have been a deputy sheriff in the homicide department for a long time?

A. That's right.

Q. And you have heard these cases tried around here ten or 15 years?

A. Yes, sir.

Q. You know that the constitution of the State requires that John Ware have a lawyer?

A. I know that it doesn't require that I get one for him.

Q. You know that this County has a public defender?

A. I do.

Q. That public defender is paid a salary by this County to represent people like John Ware, a negro without money?

A. He is paid to represent people.

Q. Why didn't you call the public defender?

A. Mr. McCormick, I was under no obligation to call him a lawyer.

Q. You didn't want a lawyer there because you wanted to get a confession from John Ware and convict him?

A. It didn't make any difference to me whether he had a lawyer or not. He didn't ask for one and I didn't get him one." (Record Pages 32-133.)

So the Court can readily see that the violation of the Constitutional Rights of these defendants was deliberate and intentional.

This Honorable Court observes the attitude of General Gerber embodied in the objection made above. In this objection he was obviously over-looking the Constitutional Rights involved and in the open Court Room did not recognize Constitutional Rights.

If the Public Defender had been called in on all of these proceedings and the requirements of the Constitution complied with, all of the disputed questions of fact as to what transpired in the "confession chamber" on the fifth floor of the Shelby County Jail would have disappeared.

We do not have a situation here where, as is usual, a Court is called upon to appoint Counsel to represent helpless defendants. We have in this case a lawyer provided by Act of the Tennessee Legislature and paid a salary to perform this service at all times. We do not have to wait for a Court appointment.

Mr. Justice Rutledge in the case of *Wood* v. *United States*, 128 Federal, Page 267, held illegal as evidence against an accused defendant his plea of guilty both at a preliminary hearing and upon arraignment.

On this question of Constitutional Rights to Counsel we invite the Court's reading of this case.

The aid of counsel in preparation would be farcical if the case could be foreclosed by preliminary Inquisition which would squeeze out conviction or prejudices by means unconstitutional if used at the trial.

We submit, May it Please the Court, that Ware's case was foreclosed against him on the fifth floor of the Shelby

County Jail when his so-called confession was secured without the aid of counsel or friends and through coercion, fear of mob violence, intimidation, and duress.

His Trial in the First Division of the Criminal Court of Shelby County, Tennessee, therefore, was a mere formality.

His only witness "The presumption of innocence" was in the "Confession Chamber" on the fifth floor of the Shelby County Jail taken from him, wrapped up, and placed in a portfolio of the Attorney General of Shelby County, Tennessee, and pulled out of this portfolio at the Trial and used against him.

This proceeding rendered it farcical at the trial for either the State's Attorney or Counsel for the defendants to discuss with prospective jurors that the defendant was presumed to be innocent of the charge upon which he was being tried, and that, that presumption of innocence should stand as a witness for him throughout the trial until overcome by the State by competent and credible proof. The Attorney General as aforesaid had this witness in his portfolio. Defendant Ware had been by coercion, duress, and threats of mob violence forced to destroy this, his own witness.

It is submitted that the convictions of these defendants are a nullity because they were obtained in violation of their Constitutional Rights and the privilege given both of them by the Fifth and Fourteenth Amendments to the Constitution of the United States. It is at open war with Due Process.

To allow these convictions to stand would approve and legalize a system of procedure by Prosecuting Officers to entrap and hold inquisitions with consequences for accused persons and for administration of criminal justice not tolerable under our Constitution. Other Governments do, but we must not. Other Governments do, we can not.

We invite the Court's attention to the case of *Malinski* v. *The State of New York* cited above.

Mr. Justice Frankfurter in his concurring opinion in this case so aptly and perfectly covers the point at issue in the case of these defendants, and sets forth so forcibly what is in our mind that we beg the indulgence of the Court to quote as follows:

> "To come concretely to the present case, the question is not whether the record permits a finding, by a tenuous process of psychological assumptions and reasoning that Malinski by means of a confession was forced to self-incrimination in defiance of the Fifth Amendment. The exact question is whether the criminal proceedings which resulted in his conviction deprived him of the due process of law by which he was constitutionally entitled "to have his guilt determined. Judicial review of that guaranty of the Fourteenth Amendment imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia."

Even Mr. Chief Justice Stone in the dissenting opinion in the *Malinski* case agrees with the position, on this question involved here, of Mr. Justice Frankfurter and the opinion of the Court. He says, Page 799:

> "We agree that the controlling principles upon which this Court reviews on constitutional grounds a state court conviction for crime, are as stated in the opinion of Mr. Justice Frankfurter."

We say here in our case at bar, as Mr. Justice Frankfurter said in the case of *Malinski*, that the proceedings of

the Prosecution, the Officers of the Sheriff, coercion in the "confession chamber," the details transpiring with Ashcraft in the "confession chamber" over a period of thirty hours, quoting Mr. Justice Frankfurter:

> "All these in combination are so below the standards by which the criminal law, especially in a capital case, should be enforced as to fall short of due process of law."

May It Please the Court:

We give importance to the questions discussed in the above quotation for the reason that they bear so powerfully and directly on this case of these defendants.

We say this for the reason that it was the adroit position of the Prosecution and it will likely be one of the contentions here that they did not introduce any admissions of Ashcraft that were incriminatory.

The record in this case does not support this contention or the position of the State. For all practical purposes the Prosecuting Attorney may as well have introduced and read to the jury the written instrument purported to be the confession of Ashcraft. The Jury may as well have been told in plain language that Ashcraft had confessed. We find in the record the following testimony:

State Witness—Waldauer:

> "Q. When you got in this room where the defendant Ashcraft was, with Dr. McQuistion, I will ask you to state to the jury whether Dr. McQuiston and the defendant Ashcraft had a conversation? I don't want you to tell what the conversation was, but did they have a conversation?
>
> A. Yes, sir. There were some others in the room that I omitted to name. At that time there was in the room Mr. Becker, Mr. Ezell, Mr. Battle, Mr. Joiner, Dr. McQuistion and myself.

Q. After this conversation took place there between Dr. McQuiston and the defendant Ashcraft, state to the jury whether any examination was made by Dr. McQuiston of Mr. Ashcraft?

A. Yes, sir, there was.

Q. Do you remember whether his clothes were taken off and whether Dr. McQuiston examined him there?

A. Yes, sir, he did.

General Gerber: You may take the witness.

Mr. Bickers: I want to renew my motion that the Court delete any reference to the defendant E. E. Ashcraft from the statement that this witness made and any reference to him in that room.

The Court: Overruled.

Mr. Bickers: Exception. No questions." Record Pages 142-143.

DR. J. A. MCQUISTON testified as follows:

"Q. After you got to this building where did you go?

A. To an office on the 5th floor.

Q. State to the Jury if at that time on the 5th floor of this building you saw the defendant Ware?

A. I did.

Q. What was done up there at that time, doctor?

A. The supposed confession was read to John Ware and he was requested to sign the confession. After it appeared that he couldn't write his name, he was assisted in making his mark by Mr. Waldauer, who took his acknowledgment.

"Q. I will ask you whether that confession or statement was read back to John Ware in your presence?

A. It was.

Q. Did you have a copy of it at that time?

A. Yes, I had a copy of it.

Q. After the statement was read back to Ware and was executed in your presence by Mr. Waldauer, I will ask you if you made any examination of the body of Ware at that time?

A. I did.

Q. State to the jury whether that examination showed any signs that anybody had beaten or struck him?

A. There was no indication of such.

Q. Did you ask him how he had been treated?

A. I did and his answer was that he was treated all right.

Q. After you made this examination of Ware I will ask you if you went to where E. E. Asheraft was?

A. I did.

Q. State to the jury whether at that time you had a conversation with the defendant Asheraft?

A. Yes, sir, a limited conversation.

Q. I don't want you to state what he said, but you did have a conversation with him?

A. Yes, sir.

Q. What was his condition at that time, referring to fatigue?

A. He appeared normal.

Q. Were his eyes bloodshot?

A. No, sir.

Q. Was any complaint made to you by Mr. Asheraft as to any mistreatment of any kind?

A. No, sir.

Q. After you had this conversation with him, was he disrobed and did you examine him?

A. Yes.

Q. Did you find any marks of violence or evidence that he had been struck by anybody?

A. No, I did not." Record Pages 145-146.

State Witness Becker testified more fully to the same effect. Becker also testified that he had Dr. McQuiston called in for these physical examinations because he was afraid that these defendants might claim that they were beaten up and these confessions secured as a result of physical violence.

The Court will see from this testimony that the Jury was virtually and in effect told that Asheraft had actually

confessed his guilt. The inference and implication is perfectly apparent. It did not take a smart jury to draw this conclusion. This Jury evidently did and found him guilty.

The State contends that all this testimony against Ashcraft does not incriminate him and is therefore harmless. We say that this testimony presents an adroit and subtle effort to convict Ashcraft by circumventing the holding of this Honorable Court in its opinion and in violation of both the letter and spirit of it.

This procedure on the part of the State of Tennessee does not measure up to, but falls ignobly short of due process of law. The State has attempted to do indirectly what it has been prohibited from doing directly by the opinion of this Honorable Court.

They introduced before the Jury all of the details of conversations, quizzings, and what transpired in the "confession chamber" with Ashcraft up until Monday morning when Ware's alleged confession was presented to him, and he admitted, as is claimed, it was true. There the State stopped.

Coercive proceedings of thirty hours or more are detailed in this record. These proceedings were embodied in the written instrument and detailed in the former record considered by this Court and ruled illegal in its opinion.

The details of what transpired in the "confession chamber" with Ashcraft over the 30-hour period, testified to by the Officers, as evidence, whatever it might be called "circumstantial" or what-not, was illegally secured through coercion and intimidation so held by this Court and he cannot be convicted upon it. Mr. Justice Rutledge so ruled in his concurring opinion in the *Malinski* case when he said:

> "Whatever may be the rule as to the use of evidence secured by means merely unlawful, in my judgment the

Constitution does not tolerate the use of evidence obtained by unconstitutional methods, including coercive ones, to bring about a conviction for crime which is constitutional. The Constitution does not thus nullify its own terms, setting them at war with each other."

We say that the evidence upon which Ashcraft is convicted,—however it may be designated, if it can be called evidence at all was secured by unconstitutional methods including coercion and it has been so held by this Honorable Court in its opinion in this case.

We have before stated that the office of the Public Defender was created in 1917 by the Legislature of the State of Tennessee for the purpose, among others, of abolishing "Third Degree Methods" and Inquisitions in Shelby County. It has not met with any great success and the glaring reason is reflected by this record. He is never called, doesn't know what's going on until the Prosecution and the Officers have accomplished their foul purposes of securing confessions. Then it is too late,—just as in this case.

A favorable ruling from this Court in this case will end this unconstitutional practice for Shelby County at least, because the Public Defender, a Public Officer sworn to support the Constitution, will be called in, as he should always be, in behalf of poor, helpless suspects on proceedings of the character reflected by this record.

The writer, who was Public Defender for Shelby County for twenty years, brought to this Court in the year 1922 or 1923 a similar case, the case of *Charles Barr* v. *The State of Tennessee*. He was repelled. At that time the spark of life in the Fourteenth Amendment to the Constitution of the United States had not flamed. It came in the case of *Chambers* v. *Florida*. Even though we were repelled in the case of Charles Barr we had an abiding faith in the

potency and the power of the Due Process Clause of the Fourteenth Amendment.

We invoke its power again in this case on the record now presented to this Court.

Authorities of some known foreign governments might or would have shot these victims at sunrise on Monday morning, June 16th, after this ordeal.

Our Prosecuting Authorities did not on that Monday morning, when Court convened, go before the Judge, call for an indictment, request the empanelment of a Jury of 12 other businessmen, relate to them "just what happened up there" in the "confession chamber", have Dr. McQuiston tell them that he, up there, after careful examination found both of these men mentally sane and physically fit, and insist that the Jury write a death warrant in accordance with their insistence and recommendation and get the whole thing over with at once.

So far as the State's case is concerned, they were fully prepared, had all the evidence available or that has ever existed against them. It all came from these defendants, from their own lips in the "confession chamber" in the nature of coerced statements, conversations, incriminations, and alleged confessions.

Two reasons suggest themselves as to why the Prosecuting Authorities did not do this or at once follow this procedure. One is, that the Prosecuting Authorities and Officers, according to their own testimony, were physically exhausted and needed rest and recuperation. However, it might be noted just here, that Dr. McQuiston, and Businessmen Castles and Pidgeon in the other record, testified that Ashcraft and Ware were both bright and fresh physically at the end of this long session or ordeal. The other reason, which suggests itself, is the fear on the part of the Authorities of public condemnation or for a show of common decency.

However, after a time the Judge of the Criminal Court empaneled a Jury and the Prosecuting Attorney recommended and insisted that the Jury write a death verdict for these defendants. He told them that he and his aides and the Sheriff's Officers had had a long physically exhausting session with these defendants on the fifth floor of the Shelby County Jail, a "confession chamber", day and night, lasting continuously from 7:00 o'clock Saturday night, June 14th, until 9:00 or 10:00 o'clock, Monday morning, June 16th, and that although the work of this session was so exhausting that the men had to work in relays, securing rest, sleep and food between sessions, that these men, the defendants, finally, freely, and voluntarily incriminated themselves and confessed their guilt.

He allowed his Representatives and other Officers to relate to the Jury the details of this story from the witness stand and had Dr. McQuiston tell the Jury that the Prosecuting Attorney and Officers called him and had had these men stripped nude for examination on the early morning of Monday, June 16th, and that he found them fresh and fit physically.

The Jury followed the recommendations and the insistence of the Prosecuting Attorney, but instead of writing a death warrant for these defendants, wrote a verdict, carrying with it a sentence of life imprisonment in the Tennessee State Penitentiary.

This is a fair, not an overdrawn picture of the case.

The Trial Judge of the Court approved.

The Trial Judge allowed no interferences with these proceedings on the part of the Prosecuting Attorney while presenting these matters and this story to the Jury.

It is significant, in the record here, that not one objection of consequence made and entered on behalf of either of these defendants was sustained by the Trial Judge either

as to the manner of procedure or as to the introduction of evidence.

Now, we see very little difference in the procedure of conviction by the Authorities of some foreign governments and the procedure of conviction followed here by our Prosecuting Authorities in this case involving these defendants. We condemn it. The Constitution of the United States condemns it. All Courts constituted, as our Courts are, ought to condemn it, and we cite as our authority the holding of the Highest Court of our Land and the Greatest Court in the World.

Ashcraft v. *Tennessee*, 322 U. S. 143, 155, 64 S. Ct. 921, 927, 88 L. Ed. 192.

There the Court says:

> "It is inconceivable that any Court of Justice in the land, constituted as our Courts are, open to the public, would permit Prosecutors serving in relays to keep a defendant witness under continuous cross-examination for 36 hours without rest or sleep in an effort to extract a 'voluntary' confession."

In addition we have what we know as and designate A Civil Liberties Statute in our Criminal Code of the United States.

The basis of the lawsuit upon which the defendant Ashcraft stands convicted finds its purported authority advanced by the State that the defendant, E. E. Ashcraft, after 28 hours of Third Degree Tactics employed against him in the "confession chamber" said to his inquisitors "a negro killed my wife". The legality and legitimacy of this so-called testimony has been unequivocally passed upon by this Court in the following language in its opinion in the instant case:

> "As to whether Ashcraft actually confessed there is a similar conflict of testimony. Ashcraft maintains

that although the officers incessantly attempted by various tactics of intimidation to entrap him into a confession, not once did he admit knowledge concerning or participation in the crime. And he specifically denies the officers' statements that he accused Ware of the crime, insisting that in response to their questions he merely gave them the name of Ware as one of several men who occasionally had ridden with him to work. The officers' version of what happened, however, is that about 11 P. M. on Sunday night, after twenty-eight hours' constant questioning, Ashcraft made a statement that Ware had overpowered him at his home and abducted the deceased, and was probably the killer."

Counsel for Defendant Ashcraft attempted to read the above excerpt from the opinion of this Court to the Trial Court when this question arose but was denied that privilege at the trial.

In the case of *Ward* v. *The State of Texas*, 316 U. S. 547 this Honorable Court said:

"This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal. All of them are to be found in this case.

"The use of a confession obtained under such circumstances is a denial of due process and the judgment of conviction must be reversed.

"Reversed."

The holding of this Court set out in the quoted excerpt covers our case at Bar.

Conclusion

Your Petitioners therefore respectfully pray that this their petition for writ of certiorari be granted and issued to the Supreme Court of the State of Tennessee to bring this cause before this Honorable Court and the record in the cause to the end that this Honorable Court might consider the issues raised in said petition and errors assigned, and that upon consideration by this Honorable Court their constitutional rights preserved, the mandate of this Court sustained, and their case reversed and dismissed.

If the Court deems necessary oral argument, we are ready.

This is the first application for a writ of certiorari in this particular case.

Respectfully submitted,

Jas. F. Bickers,
Attorney for E. E. Ashcraft.
Grover N. McCormick.
Attorney for John Ware.

EXHIBIT "D"

IN THE SUPREME COURT OF TENNESSEE

No. —

STATE OF TENNESSEE

vs.

E. E. ASHCRAFT and JOHN WARE, *Defendants*

MOTION OF THE DEFENDANTS IN THIS CASE UPON THE OPINION OF, AND THE PROCEDENDO FROM, THE SUPREME COURT OF THE UNITED STATES, AND UPON THE ADMISSIONS, RECOMMENDATIONS AND REQUESTS OF THE ATTORNEY GENERAL OF TENNESSEE, BOTH IN BRIEFS FILED AND IN ORAL ARGUMENT IN THE SUPREME COURT OF THE UNITED STATES, TO DISMISS THEIR CASES AND ENTER A JUDGMENT IN THEIR BEHALF, RELEASING THEM UPON PROPER ORDER, OR, IN THE ALTERNATIVE, REVERSE AND REMAND THEIR CASES TO THE JUDGE OF THE FIRST DIVISION OF THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE, WITH DIRECTIONS TO ENTER A VERDICT OF NOT GUILTY OR DISMISSAL AND THEN RELEASE.

MAY IT PLEASE THE COURT:

Come now the defendants and file this, their motion in this Court embodied in the above caption (but not quoted again), and in support of their motion say:

They stood convicted solely and alone in this Court upon their alleged confessions. This has been conceded all along.

It was conceded in argument in the Supreme Court of the United States by the learned Attorney General of the State of Tennessee, that their convictions could not be sustained, without the said confessions. (See opinions Supreme Court of the United States, Page One.)

With the confessions out of the record, there is not a line of testimony even connecting the defendants with the crime, and all of the evidence with the confessions out of the record, conclusively establishes the innocence of the defendants. This is the concession of the Attorney General of Tennessee.

The alleged confessions are out of the record, very definitely and certainly as to Ashcraft.

This is the holding of the Supreme Court of the United States.

Upon the record therefore, Ashcraft stands innocent before this Court.

Now as to Ware, the learned Attorney General of the State of Tennessee, in all briefs filed, and in oral argument before the Supreme Court of the United States, has recommended and requested that if Ashcraft's case were reversed and he be discharged, then the same action should be taken as to Ware, and stated specifically that the State of Tennessee rebels at the thought of letting the greater criminal escape, while the lesser pays the penalty imposed by law.

In the light of these recommendations and requests by the Attorney General of the State of Tennessee, the Supreme Court of the United States, in its opinion, saw fit to vacate the judgment as to Ware, and send this case back to this Honorable Court to carry out the recommendations and the request of the Highest Prosecuting Officer of the State of Tennessee, the Attorney General.

In effect the request and recommendation of the Attorney General, is that the case of Ware be dismissed, and he be discharged.

From the opinion of the Supreme Court of the United States, and the recommendations and requests of the Attorney General, this is the only conclusion that can be drawn.

These defendants, therefore, move that their cases be dismissed, and that a verdict of not guilty be entered by this Honorable Court, and their discharge ordered.

This Honorable Court will then further consider this case and this motion, in the light of the opinion of the Supreme Court of the United States, with the alleged confessions cut out of the record.

This Honorable Court from its inception, has on appeal reversed and dismissed, in both civil and criminal cases, where under the record, fundamental justice merited and called for this procedure.

This Honorable Court has followed this procedure under the Constitution of the State of Tennessee, the Common Law, and the Statutes of our State. This is the General Law.

See Wharton's Criminal Procedure, Vol. III, Tenth Edition, Page 2155.

There it is stated as follows:

> "The whole of a sentence may be reversed for an error in part, or a sentence, if divisible, may be affirmed in part, and reversed in part. BUT WHERE THE CASE IS ONE ON WHICH NO CONVICTION COULD, OR ON ANY CONTINGENCIES, BE SUSTAINED, THE APPELLATE COURT WILL REVERSE ABSOLUTELY, AND ORDER THE DEFENDANT TO BE DISCHARGED." (Caps ours.)

These defendants submit that this is sound, general law, and that it fits their case, upon this record, in the light of the opinion of the Supreme Court of the United States, and in the light of the concessions, admissions and requests of the Attorney General of the State of Tennessee.

We invite the Court's attention to Michies' Digest APPEAL AND ERROR, Page 730, Sections 446, 447 and 453.

This Court has consistently reversed absolutely in proper cases, where simple judgment demanded, and entered on several such final judgment as the lower court should have entered.

It has done so since the opinion of the old case Swartz Sword, State 24, Tenn. P. 101, to the present time. Especially is this true in criminal cases.

> THIS COURT HAS UNIVERSALLY FOLLOWED THIS PROCEDURE AND TAKEN THIS ACTION, IN BOTH CRIMINAL CIVIL CASES, WHERE A MOTION FOR A PEREMPTORY INSTRUCTION HAD BEEN MADE AND ERRONEOUSLY ACTED UPON, BY THE TRIAL COURT.

The opinions of this Court, in support of this proposition, are too numerous for citation.

We do not think that this proposition of law will, or could be, questioned.

Now what happened in the lower court in respect to these defendants at the close of all of the proof, as well as at the close of the State's Case?

A motion was made in behalf of both of these defendants:

I. That the confessions and all testimony appertaining thereto, be stricken from the record as incompetent and inadmissible.

II. That the case be dismissed, and a verdict of not guilty be entered in their behalf, and that the Court peremptorily so instruct the jury.

These motions were overruled by the Court and proper exceptions taken.

The rights of these defendants were preserved in their motions for a new trial for Ware; grounds VIII, IX, XIV. For Ashcraft, VI, VII, VIII.

The rights of these defendants in this regard were further preserved in this Court by proper assignments of error, which this Court, on this motion, is asked to further consider in the light of the opinion of the Supreme Court of the United States, and the admissions, concessions and requests of the Attorney General of the State of Tennessee.

It is submitted that this Court should now enter a final judgment in behalf of these defendants, releasing them, entering here the judgment that the lower court should have entered upon the original motion for a peremptory instruction in their behalf.

It is now obvious that the trial court should have granted the motions of these defendants, in the light of the opinion of the Supreme Court of the United States.

So far as our investigation goes, this Honorable Court has never deviated from this procedure. It has always taken final and determinative action in such cases.

The confessions are out of this record, and there is nothing left but testimony without contradiction, establishing their innocence.

It is submitted therefore, that this Court should finally end this litigation, and by its order, dismiss and discharge these defendants.

There is no ground or legal reason for a remand.

However, if this Honorable Court should conclude that it is a proper or preferable procedure to reverse and remand, they ask that the Court do so, with instructions to the Judge of the First Division of the Criminal Court, of Shelby County, Tennessee, to dismiss, or enter a verdict of not guilty and release them.

They submit that their case should not be, by this Court reversed and remanded for a new trial.

They have suffered the ordeal of two long, drawn out trials of their cases. They were tried and convicted before Judge Wallace, now deceased, who was then Judge of the First Division of the Criminal Court, of Shelby County, Tennessee.

At this trial they were convicted solely and alone upon their alleged confessions, just as they were at the second trial. At their first trial, the State went to great length in submitting to the jury every piece of available testimony touching upon the issue of the case.

The record of the first trial was before this Honorable Court, occasioned by the death of Judge Wallace, who had never signed the Bill of Exceptions. This Honorable Court must have observed in this record that their convictions stood alone and solely, upon their alleged confessions.

Thereupon, it became necessary to try these defendants again. The Court will see from this record, which is the record of the second hearing, that the State used every available witness who knew anything about the facts in the case. The State put on all possible testimony that it had, not only upon the first trial, but upon the second, the record of which we are now considering.

So that we most earnestly insist that this Honorable Court should not put them through a third trial, when obviously there is no other testimony upon which they could possibly be convicted with their confessions out of the record, and declared invalid and inadmissible by the Supreme Court of the United States.

Simple justice warrants the dismissal of their cases by this Honorable Court.

They therefore ask that this motion be sustained, and their discharge ordered by proper order.

Respectfully submitted,

JAMES F. BICKERS,
GROVER N. MCCORMICK,
Attorneys for Defendants

A copy of this motion has been sent to General Nat Tipton, and General Will Gerber.

EXHIBIT "E"

IN THE SUPREME COURT OF TENNESSEE

No. ——

STATE OF TENNESSEE

vs.

E. E. ASHCRAFT and JOHN WARE, *Defendants*

ANSWER OF WILLIAM GERBER, DISTRICT ATTORNEY GENERAL FIFTEENTH JUDICIAL CIRCUIT OF TENNESSEE, TO MOTION OF DEFENDANTS TO DISMISS THEIR CASES, OR, IN THE ALTERNATIVE, TO REVERSE AND REMAND THEIR CASES WITH INSTRUCTIONS TO TRIAL JUDGE TO ENTER A VERDICT OF NOT GUILTY.

MAY IT PLEASE THE COURT:

Now comes your Relator, William Gerber, the duly elected, qualified and acting District Attorney General for the Fifteenth Judicial Circuit of the State of Tennessee and in answer to the Petition of the Defendants heretofore filed says:

The Respondent admits that the Supreme Court of the United States in an opinion previously delivered in the

aforestyled cause has ordered the exclusion of the confession of the defendant, Ashcraft, and has remanded the case against the defendant, Ware, for further consideration in accordance with said opinion.

The Respondent most emphatically denies that a conviction cannot be sustained against the defendant, Ashcraft, without his confession, which was made shortly after the commission of this atrocious crime.

On the contrary, we submit to this Honorable Court that there is ample and sufficient proof available at this time without the use of the confession of Ashcraft to warrant a conviction of Murder in The First Degree as to both the defendants, Ashcraft and Ware.

The Respondent urges upon this Honorable Court the positive and unequivocal contention that the proof now available will show that the defendant, Ashcraft, was the prime mover in the killing of Zelma Ida Ashcraft and that he hired and counseled the defendant, Ware, to actually do the killing.

The Respondent is of the opinion that upon the available proof the guilt of these two defendants can be established beyond a reasonable doubt, to a moral certainty and to the exclusion of every other reasonable hypothesis.

The Respondent, therefore, insists that there is no merit in any of the allegations raised by the defendant's Petition, urges that said Petition be dismissed, and that both defendants be ordered retried jointly.

Respectfully submitted,

WILLIAM GERBER,
District Attorney General, Fifteenth Judicial Circuit, State of Tennessee.

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

No. —

SHELBY CRIMINAL

E. E. ASHCRAFT and JOHN WARE

v.

STATE OF TENNESSEE

MOTION TO REMAND AND BRIEF OPPOSING MOTION TO DISMISS

MAY IT PLEASE THE COURT:

Now comes the State of Tennessee and moves the Court that conformably to the mandate of the Supreme Court of the United States this date filed in the office of the Clerk of this Court that the causes in question be remanded to the Criminal Court of Shelby County for such further proceeding as that court may take thereon.

As is known to the Court, the judgment of the Criminal Court of Shelby County against plaintiffs in error, later affirmed by this Court, was reversed by the Supreme Court of the United States for further proceedings. The normal procedure in such cases is for this Court to remand the causes to the trial court and the state respectfully insists that such procedure be followed in the present case.

Opposing the motion of the plaintiffs in error that this Court enter an order of dismissal in each of the above styled causes, the state would respectfully show that such action on the part of this Court would constitute the exercise of original jurisdiction prohibited by the organic law in this jurisdiction. After all, the sufficiency of the evidence against the plaintiff in error Ashcraft with his confession elided as required by the judgment of the Supreme Court of the United States, is a question which should be passed upon in the first instance by a trial jury. The District Attorney General to whom responsibility has been confided

by law for the prosecution has filed in this Court a brief opposing the dismissal of these cases and insisting that in his opinion the evidence warrants another trial. That responsibility which the law has placed upon him should not be assumed by this Court but upon the contrary, the normal procedure in such cases should be followed.

The primary thought of the motion seems to be that the trial court in the second trial erroneously overruled the motion for a directed verdict and that this Court should now sustain such motion and direct a verdict in favor of the plaintiff in error Asheraft. This contention loses sight of the fact that this Court has never recognized the propriety of directing a verdict in criminal cases but on the contrary, has expressed its disapproval thereof. Knowling v. State, 176 Tenn., 56.

So far as Ware be concerned, while the representatives of the state did insist that his conviction be reversed in case that of Asheraft was, the Supreme Court of the United States did not hold inadmissible his confession but directly avoided a decision upon that point although definitely challenged by the minority opinion to do so. However, as stated by the representatives of the state, it is desirable that the case proceed jointly against both the plaintiffs in error and for this reason, the representatives of the state request that the judgment of this Court against plaintiff in error Ware be remanded also to the Criminal Court of Shelby County for purposes of trial.

For the reasons stated, the state respectfully insists that the motion of the plaintiffs in error to dismiss the prosecutions against them in this Court should be denied and that the causes against plaintiffs in error should be remanded to the Criminal Court of Shelby County for further proceedings.

Respectfully submitted,

NAT TIPTON,
Assistant Attorney General.

NT:ME 6/19/44.